

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

)	Civil Action Nos.:
EST. OF JOHN McINTYRE, et al,)	01-CV-10408-RCL
EST. OF MICHAEL DONAHUE, et al,)	01-CV-10433-RCL
EST. OF E. BRIAN HALLORAN, et al,)	01-CV-11346-RCL
EST. OF ROGER WHEELER, et al,)	02-CV-10464-RCL
EST. OF RICHARD CASTUCCI, et al,)	02-CV-11312-RCL
EST. OF LOUIS LITIF, et al,)	02-CV-11791-RCL
EST. OF WILLIAM BENNETT, et al)	02-CV-11802-RCL
EST. OF DEBRA DAVIS, et al.)	02-CV-11911-RCL
Plaintiffs,)	
)	
v.)	
)	
UNITED STATES OF AMERICA, et al,)	
Defendants.)	

**EMERGENCY MOTION OF THE PLAINTIFFS FOR ORDER COMPELLING
IMMEDIATE PRODUCTION OF CERTAIN DISCRETE CATEGORIES OF
DOCUMENTS RELEVANT TO UPCOMING DEPOSITIONS AND TO EXTEND
QUALIFIED IMMUNITY DISCOVERY**

NOW COME the plaintiffs and hereby move this Honorable Court on an emergency basis for an Order compelling the defendant United States to produce, on or before April 11, 2003, certain discrete categories of documents relevant to two upcoming depositions, which are currently scheduled for April 14 and 15, 2003. A proposed order listing the documents requested on an emergent basis is attached hereto as Exhibit A. The plaintiffs also seek an order extending the period for qualified immunity discovery (as defined by the October 29, 2002 Order of this Court) for a reasonable time after a decision is rendered by this Court on the United States' Motion for a Protective Order, filed with respect to the Joint Request of the Plaintiffs for the Production of Documents (Fed. R. Civ. P. 34). A proposed order on extension of time is attached hereto as Exhibit B. As reasons in support, the plaintiffs state as follows:

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1) On October 29, 2002, this Court (Lindsay, D.J.) ordered the opening of a period of discovery on the “common issues” of the above-captioned related civil cases, with this qualified immunity discovery period ending May 1, 2003. See *Donahue v. United States et al*, 01-CV-10433-RCL (Paper # 97) (the “10/29/02 Order”).

2) On November 22, 2002, the plaintiffs filed a Joint Request for the Production of Documents to the United States (the “Rule 34 Request”) pursuant to Fed. R. Civ. P. 34 and the 10/29/02 Order.¹ On December 19, 2002, the United States filed a Motion for a Protective Order relating to the Rule 34 Request, which was timely opposed by the plaintiffs. The United States’ reply brief and Plaintiffs’ opposition to the reply brief on the issue were filed on January 21 and 31, 2003, respectively, and the matter was referred to Magistrate Judge Alexander (see Donahue Paper # 120 (Jan. 8, 2003)). **To date, the United States has not provided a response to the Rule 34 requests², and to date, no action has been taken by the Court on the matter.**

3) The documents sought by plaintiffs’ Rule 34 Request to the United States are the cornerstone of discovery required by the plaintiffs, and are prerequisites to any further discovery. With the current qualified immunity discovery deadline, however, the plaintiffs have **less than one month remaining** to conduct discovery before the individual defendants are entitled to file summary judgment motions on qualified immunity. With this deadline in mind, the plaintiffs have noticed the depositions of each of the individual defendants, plus five non-party witnesses

¹ The plaintiffs have also served Rule 34 requests for production on each of the remaining defendants, have served Rule 33 Interrogatories on all defendants, and have issued subpoenas to nine various local law enforcement agencies. In terms of documents, the total response to date has been 6 pages.

² The Government has provided some peripheral documents since the opening of discovery, however the core documents sought, namely the so-called JTF documents, the documents resultant from and gathered in the OPR investigation of Connolly and Morris, the documents gathered and/or produced to defendants in the related criminal cases, the informant files of Bulger and Flemmi, and the files on the deaths (and investigations thereof) of the plaintiffs’ decedents, have all been withheld.

to occur before the deadline of May 1, 2003. Given the large number of defendants, the current schedule of depositions is one deposition per business day from April 14 to April 30, 2003 (the day before qualified immunity discovery is to close under the current deadline). See Deposition Schedule attached as Exhibit C.

4) With 11 days until the first deposition, the plaintiffs do not anticipate having the necessary documents to take these depositions, which would require a decision from the Court and a subsequent response of the United States within those 11 days. The plaintiffs, therefore, propose as follows:


a) The first two scheduled depositions (scheduled for April 14 and 15, 2003) are of John Durham and Charles Prouty, respectively the head of the Justice Task Force and the former lead investigator in the 1997 OPR investigation into the activities of John Connolly and John Morris in their roles as FBI agents. These depositions are anticipated to result in a roadmap to future discovery, given that these individuals presumably are the most knowledgeable regarding the information which the United States has with respect to the activities of Mr. Connolly and Mr. Morris around which the plaintiffs' complaints revolve. Given the "roadmap" nature of these depositions, the plaintiffs anticipate that these two depositions could be conducted with a more limited number of documents than is requested by their original Rule 34 Request, and therefore now request those documents essential to these depositions on an emergency basis, listed in Exhibit A. Plaintiffs understand and believe that these documents have already been compiled with respect to other legal and administrative actions, and therefore assert that their

production could be expeditious (further, these were among the documents requested four months ago by plaintiffs).

b) With respect to the other noticed depositions, including all individual defendants, the plaintiffs require the full production requested by their original Rule 34 Request, and in any case, do not anticipate that they will be able to conduct all noticed depositions between the time of document production and the current qualified immunity deadline. The plaintiffs therefore request that the deadline for qualified immunity discovery be extended for a reasonable time beyond the date on which the Court's decision on the pending United States Motion for a Protective Order (with respect to plaintiff's Rule 34 Request) (Paper #117, filed November 19, 2002) is issued, and any subsequent and complete production of documents is made by the Government. This would provide the plaintiffs an opportunity to depose the individual defendants with a full response to initial discovery.

For these reasons, the plaintiffs respectfully request that this Court enter Orders as proposed by Exhibits A and B.

Respectfully submitted, this 4th day of April, 2003, for the collective plaintiffs:



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COUNSEL FOR THE PLAINTIFFS IN EST. OF MICHAEL DONAHUE V. UNITED STATES ET AL (U.S.D.C., D. MASS.01-CV-10433-RCL)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON THIS DAY A TRUE COPY OF THE ABOVE DOCUMENT WAS SERVED UPON THE ATTORNEY OF RECORD FOR EACH PARTY BY MAIL/BY HAND/BY FAX.

DATED: 4/4/03

CERTIFICATE OF SERVICE

I, Christopher T. Meier, certify that on the date shown below, I made service of the foregoing document(s), by causing a copy thereof to be mailed, postage prepaid, to all counsel of record.



CHRISTOPHER T. MEIER

Dated: Apr 4, 2003

S:\DONAHUE, ESTATE OF MICHAEL V. USA-FBI - PE-000-5064\pleadings\DISCOVERY DISPUTES\Motion to compel documents (small categories).doc

Exhibit AUNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

)	Civil Action Nos.:
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EST. OF DEBRA DAVIS, et al.)	02-CV-11911-RCL
Plaintiffs,)	
)	
v.)	
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UNITED STATES OF AMERICA, et al,)	
Defendants.)	

(PROPOSED) ORDER RELATING TO THE PRODUCTION OF DOCUMENTS

Having carefully reviewed the submissions of the parties, I hereby ORDER that the United States shall produce to the plaintiffs, not later than April 11, 2003, the following documents:

- 1) Any and all documents produced in discovery to any defendant in the following related criminal cases: United States v. Salemme, 94-CR-10287-MLW; United States v. Flemmi, 01-CR-10199-MLW; United States v. Martarano, 97-10009-MLW; United States v. Connolly, 99-CR-10428-JLT; United States v. Weeks, 99-CR-10371-RGS; United States v. Weeks, 99-CR-10245-RGS; and United States v. Steven Flemmi et al, 1997-CR-10060-REK (the "Related Criminal Cases");
- 2) The Office of Professional Responsibility (FBI) report regarding Mr. Connolly and/or Mr. Morris issued in or around 1997 or 1998;
- 3) The file(s) relating to any OPR (FBI or DOJ) investigation of Mr. Connolly and/or Mr. Morris;
- 4) The informant files for James Bulger (headquarters and field office), respectively FBI files numbered 137-4075 from the Boston Field office and 137-26543 from FBI headquarters, and for Steven Flemmi (Boston Field File No. 137-2387 and Headquarters

File No. 166-7921 and 137-13732, with corresponding so-called sub-A files and "pink sheets."

- 5) The FBI files related to the murder and/or death of each of the plaintiffs' decedents, including John McIntyre, Michael Donahue, E. Brian Halloran, Roger Wheeler, Richard Castucci, Louis Litif, William Bennett, and Debra Davis.
- 6) FBI-Boston file numbers 183-817, 183-84, 88-8668, 92-2309, 182-1018, 183-1018, 62-5677, and 67-22413, and FBI headquarters file no. 166-7514.
- 7) Any and all files regarding administrative investigation(s) relating to John Connolly, John Morris, Lawrence Sarhatt, Robert Fitzpatrick, James Ring, James Ahearn, and/or H. Paul Rico.
- 8) Any prosecutorial declination memoranda relating to considered or proposed prosecutions of James Bulger and/or Steven Flemmi prior to 1985.
- 9) The tape recordings referred to in Defendant's Trial Exhibit Y from *United States v. Connolly*, 99-CR-10428-JLT.

The United States shall not withhold from the plaintiffs any documents based upon protective orders entered in any of the Related Criminal Cases. The Honorable District Judge Mark L. Wolf of this Court has entered an order modifying the protective orders in the cases of United States v. Salemme, 94-CR-10287, United States v. Flemmi, 01-CR-10199, and United States v. Martarano, 97-10009, such that these protective orders do not affect civil discovery in the instant matter. Similar protective orders entered by Judges Joseph L. Tauro and Richard G. Stearns of this Court in the cases of United States v. Connolly, 99-CR-10428-JLT, United States v. Weeks, 99-CR-10371-RGS, and United States v. Weeks, 99-CR-10245-RGS, were predicated on Judge Wolf's order. As I noted in the February 21, 2002 Scheduling Conference in McIntyre, to the extent that Judge Wolf has opened up his order to allow production of documents in this case, I find that to be the opening up of both Judge Tauro's order and Judge Stearn's order to the same extent. Furthermore, a protective order has entered in the instant case such as will keep confidential and under seal the materials produced pursuant to this Order, which is substantially

similar to that entered in United States v. Salemme, 94-CR-10287-MLW. For all these reasons, I specifically find that the Protective Orders entered in the criminal cases listed in this paragraph do not affect the production of documents under this Order, and no document shall be withheld on this basis.

I further hold that no document which has to date been produced to any criminal defendant in any of the Related Criminal Cases shall be withheld from the plaintiffs for any reason.

Finally, if any document ordered to be produced under this Order is withheld from the plaintiffs on the basis of privilege or otherwise, a copy of each such document shall be submitted to this Court for *in camera* review, with an identification of the privilege asserted or other rationale for withholding. See 5 U.S.C. § 301; United States v. Nixon, 418 U.S. 683 (1974). Counsel for the United States should also identify the individual(s) who decided to assert such privilege, and certify that all documents ordered produced by this Order have been produced either to the plaintiffs or this Court. The Court will thereafter make individual determinations with respect to the production of withheld documents.

This order shall not be construed to limit the scope of documents to which the plaintiffs may be entitled under Fed. R. Civ. P. 26 and in the normal course of discovery.

IT IS SO ORDERED.

By the Court,

Dated: _____

Exhibit B

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Plaintiffs,)	
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UNITED STATES OF AMERICA, et al,)	
Defendants.)	

**(PROPOSED) ORDER RELATING TO COMMON ISSUE/QUALIFIED IMMUNITY
DISCOVERY DEADLINE**

Having carefully reviewed the submissions of the parties, I hereby ORDER that the deadline for discovery on the qualified immunity/common issues of the above-captioned related civil cases, set for May 1, 2003 by October 29, 2002 Order of this Court, *Donahue v. United States et al*, 01-CV-10433-RCL (Paper # 97), is hereby extended until _____ days after this Court renders a decision on the United States Motion for a Protective Order, *Donahue v. United States et al*, 01-CV-10433-RCL (Paper # 114) (Dec. 19, 2002). ■

IT IS SO ORDERED.

By the Court,

Dated: _____

Exhibit CUNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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SCHEDULE OF CURRENTLY NOTICED DEPOSITIONS

<u>Deponents</u>	<u>Date</u>	<u>Office</u>
-John Durham (JTF)	Monday, April 14, 2003	S&W
- Charles Prouty (OPR)	Tuesday, April 15, 2003	S&W
-Jeremiah O'Sullivan	Wednesday, April 16, 2003	S&W
-H. Paul Rico	Thursday, April 17, 2003	KLH
-Dennis Condon	Friday, April 18, 2003	KLH
-Lawrence Sarhatt	Monday, April 21, 2003	S&W
-Robert Fitzpatrick	Tuesday, April 22, 2003	S&W
-James Greenleaf	Wednesday, April 23, 2003	KLH
-James Ring	Thursday, April 24, 2003	KLH
-James Ahearn	Friday, April 25, 2003	KLH
-Roderick Kennedy	Monday, April 28, 2003	KLH
-John Morris	Tuesday, April 29, 2003	S&W
-John Connolly	Wednesday, April 30, 2003	S&W
- Frank Salemme	To Be Rescheduled	
-Patrick Nee	To Be Rescheduled	
-Steven Flemmi	To Be Rescheduled	
-Kevin Weeks	To Be Rescheduled	
-John Martarano	To Be Rescheduled	